*** THE HON'BLE THE ACTING CHIEF JUSTICE BILAL NAZKI**
AND
*** THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN**

+ WRIT PETITION NOs. 5563 AND 13933 OF 2007

%Dated 31.12.2007

W.P.No.5563 of 2007:

Between:

Dr.P.Sitapati Rao

…….. PETITIONER

$ Institution of Lokayukta, Andhra Pradesh, Hyderabad rep.
by its Registrar

…… RESPONDENT

! Counsel for Petitioner : Sri. Sr. S.R.Ashok

^ Counsel for Respondent : Sri.M.V.S.Suresh Kumar

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? Cases referred
[1] AIR 1988 SC 1369
2AIR 1974 SC 1863
3(2002) 5 SCC 111
42004(2) ALT 663
5(2004)5 SCC 263
6(1976) 1 SCC 11
7(1990)1 SCC 589
8AIR 1967 SC 884
9AIR 1981 SC 53
10AIR 1984 SC 161
11AIR 1965 SC 360
12AIR 1977 SC 1677
13(1997) 11 SCC 650
142004(5) SCC 263

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THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN

WRIT PETITION NOs. 5563 AND 13933 OF 2007

COMMON ORDER: (The Hon'ble Sri Justice Ramesh Ranganathan)

Dr. P. Sitapati Rao, hitherto the Additional Director General (Irrigation), National Academy of Construction and Ex-officio Advisor, Irrigation & Command Area Development Department of the Government of A.P. has filed these two writ petitions. In W.P. No. 5563 of 2007, the order of the Honourable Lokayukta dated 05.03.2007 in holding him to be a "pubic servant", both under Section 2(k)(iii) and 2(k)(V)(4) of the A.P. Lok Ayukta and Upa-Lok Ayukta Act, 1983, (hereinafter referred to as Act 11 of 1983), and as amenable to the jurisdiction of the Lokayukta, is under challenge. In W.P. No. 13933 of 2007, the provisions of Section 10 of the A.P. Lokayukta and Upa Lokayukta Act, 1983, (hereinafter referred to as "Act 11 of 1983"), is under challenge, in so far as it empowered the Lokayukta to *suo motu* conduct an investigation and to adjudicate issues, as ultravires Article 14 of the Constitution of India. The petitioner also seeks to have the order passed by the Lokayukta, in C.M.P. Nos. 5 and 6 in Complaint No.890/2005/B1 dated 25.6.2007, set aside. In C.M.P. No. 5, the petitioner had requested the Lokayukta to cause an

enquiry into the reasons why phone calls were made from the Registry and the interest of the individual in getting the proceedings of the Lokayukta published in newspapers. In C.M.P. No. 6, the petitioner sought transfer of Complaint No.890/2005/B1 from the file of the Hon'ble Lokayukta to the file of the Hon'ble Upa Lokayukta.

Since Sri S.R. Ashok, Learned Senior Counsel appearing on behalf of the petitioner, has fairly stated that the petitioner was not pressing Writ Petition No. 13933 of 2007, it is not necessary for us to examine either the vires of Section 10 of Act 11 of 1983 or the orders passed by the Lokayukta in C.M.P. Nos. 5 and 6, in Complaint No.890/2005/B1, dated 25.6.2007. W.P. No. 13933 of 2007 is dismissed as not pressed.

Even in W.P. No. 5563 of 2007, Sri S.R. Ashok, Learned Senior Counsel, has confined his submissions, on the validity of the order of the Lokayukta dated 5.3.2007, to the limited extent that the petitioner was held to be a "public servant". Learned Senior Counsel seeks adjudication only on the question whether the petitioner was, during the relevant period, a public servant within the meaning of either Section 2(k)(iii) or Section 2(k) (v)(4) of Act 11 of 1983, for, according to him, it is only if the petitioner is held as such would he be amenable to the jurisdiction of the Lokayukta. Learned Senior Counsel would request that the other questions raised in this writ petition be left open. Since our decision is invited only on the question whether the petitioner is a "Public Servant", either under Section 2(k)(iii) or 2(k)(v)(4) of Act 11 of 1983, it is wholly unnecessary for us to examine any of the other questions raised in this writ petition.

Elaborate submissions were made by Sri S.R. Ashok,

learned Senior Counsel ably assisted by Sri O. Manohar Reddy, learned Counsel for the petitioner. Sri M.V.S. Suresh, learned Standing Counsel for the Institution of the Lok-Ayukta, made a detailed reference to the order under challenge and to several G.Os and other proceedings in support of his submission that the order of the Lok-Ayukta was valid and did not necessitate interference in proceedings under Article 226 of the Constitution of India.

IS THE NATIONAL ACADEMY OF CONSTRUCTION, OF WHICH THE PETITIONER WAS THE ADDITIONAL DIRECTOR GENERAL (IRRIGATION), A SOCIETY WHICH IS SUBJECT TO THE CONTROL OF THE STATE GOVERNMENT:

Section 2(k) of Act 11 of 1983 defines "public servant" to mean a person falling under any of the descriptions mentioned thereunder. Under clause (v)(4) thereof, every director, in respect of any society registered under the A.P. (Telangana Area) Public Societies Registration Act, 1350 F and subject to the control of the Government, is also a "public servant". Section 2(e) of Act 11 of 1983 defines "Government" to mean the State Government. It is not in dispute that the petitioner as the Additional Director General of the National Academy of Construction falls within the description of "director" and, as the National Academy of Construction was registered as a society under the A.P. (Telangana Area) Public Societies Registration Act, 1350 Fasli, vide Registration No. 4844 of 1998, dated 24.09.1998, he is a director of a society.

The question to be answered is whether the petitioner is a director of a society subject to the control of the State Government. To answer this question we must first examine whether the National Academy of Construction is a society which

is subject to the control of the State Government.

It is true that the National Academy of Construction (hereinafter referred to as the Academy) is an independent legal entity and is not a department of the Government. It must however be borne in mind that the words “subject to” or “under” do not connote complete control in the sense of being owned by the State Government, and to construe it as such, the words “subject to” will have to be substituted by the words “of”. The words “subject to” cannot be taken to have the same meaning as the word “of” which may bring in the notion of ownership. Had that been the intention of the legislature there is no cogent reason why the word “of” was not used in place of the words “subject to”. The concept of subjugation can be relevant only when there are two entities one of which may be subject to the control of the other. While a department of the government strictly speaking is a part of the government, a society registered under the A.P. (Telangana Area) Public Societies Registration Act, is a separate legal entity, and is not a government department. The mere fact that the National Academy of Construction is a distinct legal entity, and is not a department of the government, cannot, by itself, be a circumstance from which it may be deduced that it cannot be a society subject to the control of the State Government. (**C.V. Raman Vs. Management of Bank of India**[1]).

The word “control”, used in clause v(4) of Section 2(k) suggests check, restraint or influence. Control is intended to regulate and hold in check and restrain from action. (**State of Mysore Vs. Allum Karibasauppa**[2]). A society would be subject to the control of the State Government if it is under the influence of

the State Government or the State Government has the power to regulate its affairs and exercise check on it.

Though decisions in cases dealing with Article 12 of the Constitution of India cannot be made the basis to hold that the National Academy of Construction is a society subject to the control of the State Government, it cannot be gainsaid that the salient principles which have been laid down in those cases with regard to the authorities having a separate legal entity, and exercising autonomy in certain spheres, will certainly be useful in determining whether the National Academy of Construction is a Society subject to the control of the State Government. (**C.V. Raman**[1]).

I n **Pradeepkumar Biswas Vs. Institute of Chemical Biology**[3], the question which fell for consideration before a seven judge bench of the Supreme Court was whether the Council of Scientific and Industrial Research (CSIR) was a State within the meaning of Article 12 of the Constitution of India and the Supreme Court observed:

"…….The picture that ultimately emerges is that the tests formulated in *Ajay Hasia* are not a rigid set of principles so that if a body falls within any one of them it must, ex hypothesi, be considered to be a State within the meaning of Article 12. **The question in each case would be — whether in the light of the cumulative facts as established, the body is financially, functionally and administratively dominated by or under the control of the Government. Such control must be particular to the body in question and must be pervasive. If this is found then the body is a State within Article 12. On the other hand, when the control is merely regulatory whether under statute or otherwise, it would not serve to make the body a State……" (emphasis supplied)**

It is contended on behalf of the petitioner that the National Academy of Construction is a private society not subject to the

control of the State Government, that the bye-laws of the society clearly show that the governing body of the society was the supreme authority and any decision taken by it was not subject to any review by the Government nor did the government have any control, the mere fact that the Chief Minister was the Chairman did not by itself make the society one subject to the control of the State Government, that there was no financial contribution from the Government and the entire finance of the society was from contributions from contractors, that the members of the Board of the governing body exercised independent power and, merely because the governing body had persons from government departments, an inference could not be drawn that the Government was exercising its influence over the functioning of the Society. The judgment of the Supreme Court, in **Pradeep Kumar Biswas[3]**, is sought to be distinguished on the ground that, in the said case, the Minister had the power to review the decisions taken by the governing body of the society whereas in the present case there was no power of review conferred on the Chief Minister. It is further contended that the G.Os, issued by the Government, with regards contributions, showed that the same were issued at the request of the association of the contractors, that the provisions of Section 28 only empowered the government to place such terms and conditions on the society which were mutually agreed upon and that no such conditions had been imposed by the Government on this Society. It is further contended that, since the Society was not under the control of the government, the mere fact that the petitioner was its Additional Director General did not make him a "public servant".

The Hon'ble Lokayukta relied on the judgment of the Supreme Court, in **Pradeepkumar Biswas[3]**, to hold that the tests to be satisfied, for a society to be subject to the control of the

Government, was whether the National Academy of Construction was financially, functionally and administratively dominated by the State Government. The factual details, based on which the honourable Lok-Ayukta has concluded that the State Government exercised financial, functional and administrative dominance over the Academy, are not disputed before us. What is under challenge is the conclusions drawn by him from these facts.

The Honourable Lokayukta noted that the National Academy of Construction, (hereinafter referred to as the "Academy"),was created by the State Government with the main object of promoting education, training, research etc., at all levels in construction and allied industries without any profit motive, that the first governing body was constituted by the State Government in G.O.Ms.No.108 dated 20.6.1998, that the Chief Minister of the Government of A.P. was the ex-Officio Chairman of the Academy as also its governing body, that, as ex-Officio Chairman, the Chief Minister had the power to preside over all governing and general body meetings, that the ex-Officio Chairman had also the power to nominate any member to conduct general body meetings in his absence, that as ex-Officio Chairman the Hon'ble Chief Minister had the power to fill up any vacancy that may arise in the governing body, that he had the power to nominate certain number of members to the governing body, that he had the power to appoint the Director General of the Academy who was to be a Member Secretary and that the General Body, over which he presided, had the power to consider and make decisions relating to the objects, administration, finances of the academy and to regulate the finances of the academy.

The Hon'ble Lokayukta held that the rules and regulations of the academy gave a dominant role to the Chief Minister who was the ex-Officio Chairman over the administration and financial

affairs of the academy, that the present governing body consisted of several heads of government departments and corporations and it was evident that the Government of A.P. was in a position to dominate or influence the administration of the academy and the mere fact that the rules of the academy did not specify the administrative control of the government was of no consequence. The Hon'ble Lokayukta rejected the contention advanced on behalf of the petitioner that the powers exercised by the Chief Minister was in his capacity as the Chairman of the Academy and not as the Chief Minister of the State and held that, given the fact that the Chairman of the Governing Body was the Chief Minister and the Governing Body consisted of several heads of government departments and government corporations, subjugation of the governing body to the will of the State Government was evident.

On the question of financial control, the Hon'ble Lokayukta held that the bulk of the initial funding came from government departments and government corporations who had joined as the patron members as per the directions of the government, that the recurring income of the Academy i.e., contribution from contractors was also because of the mandatory intervention of the government by issuing two G.Os. directing the departments and corporations to collect contributions from the contractors by inserting appropriate clauses in the work agreements, and, but for such mandatory intervention of the Government, contributions from the contractors could not have been collected and passed on to the Academy. He held that the governing body was dominated by, and was under the influence of, the State Government which regulated the expenditure of the Academy.

In this context it is useful to note that the State Government issued G.O.Ms. No. 92 dated 19.05.1998 for mobilization of funds for the Academy. The said G.O. notes that the Engineering-in-

Chief, Roads & Buildings department of the State Government, vide letter dated 30.03.1998, had informed that the Builders' Association of India, Andhra Pradesh Centre was requested to discuss about the contribution of 0.50% of the contract value for establishing the Institute of Construction Technology of India at Hyderabad, (later called the National Academy of Construction), for utilizing the amount in construction of buildings and for meeting the expenditure in running the Institute, that the Builders' Association of India, vide letter dated 13.02.1998, had informed that the issue was discussed in their meeting and that the members had agreed to contribute 0.25% of the contract value and had sent proposals to the Government for inclusion of this condition in all Orders of Contracts. Under the said G.O, the Government decided to permit the Executive Engineers to conclude supplemental agreements with the contractors, for works under execution and to be entrusted in future, to deduct 0.25%. The Engineering-in-Chief was requested to issue necessary instructions to all concerned and ensure that the funds were collected and remitted to the Institute.

In G.O.Ms. No. 103 dated 16.06.1998, the Government approved the scheme of starting the National Academy of Construction and granted an extent of Ac.167.30 in Sy. Nos. 5/2 to 5/23 at Izzatnagar Village, Lingampaly Mandal, Ranga Reddy District to the Academy free of cost. The Government also accorded approval for its departments and Corporations becoming patrons of the Academy by contributing Rs.30.00 lakhs each. The G.O. refers to five Government Corporations and four Government departments and they were requested to send Demand Drafts for Rs.30.00 lakhs each in favour of the to the Engineering-in-Chief, R&B department. The Engineering-in-Chief, R&B department was requested to take immediate action for establishing the National

Academy of Construction at Hyderabad. The Secretary to the Government, Revenue department, was requested to identify and alienate to the A.P. State Housing Corporation Limited suitable land in Ranga Reddy District in lieu of the land which belonged to the A.P. State Housing Corporation having been allotted to the National Academy of Construction.

In G.O.Ms. No. 61 dated 11.04.2000 the Government noted that, in the 6th Governing Board Meeting of the National Academy of Construction held on 29.12.1999, it was resolved to recover 0.25% from the contractors' gross bills as contribution to the National Academy of Construction by including it as a condition in the tender documents and agreement forms, thus making such contributions mandatory. The Government, after careful consideration and examination of the matter, directed that all its departments, as well as Corporations under their administrative control, should include the said condition in the tender documents and agreement forms so as to collect 0.25% from the contractors' gross bills as their contribution to the National Academy of Construction thus making such contribution mandatory. This condition was required to be included in the tender documents and agreement forms from 01.04.2000 onwards.

In G.O.Ms. No. 159 dated 30.10.2004, the Government noted that the Builders' Association of India, in their meeting held with the Honourable Ministers of Panchayat Raj, Irrigation, Roads & Buildings and Commercial Taxes on 30.08.2004 regarding streamlining the tender procedure for timely completion of works, had agreed that, in the interest of the State, they had no objection to their contribution of 0.25% being apportioned. After careful examination, the Government ordered that the present 0.25% contribution from the Contractors continue and be divided between Chief Minister's Relief Fund and the National Academy of

Construction in the ratio of 0.15% and 0.10% respectively with immediate effect.

Sri S.R. Ashok, Learned Senior Counsel, would however contend that the mere fact that the Government had given land free of cost would not make the Society one subject to the control of the State Government. He would refer to the fact that several private companies had been allotted land by the Government, from time to time. According to the Learned Senior Counsel, if allotment of land was the only criteria, then these private companies must also be held to be subject to the control of the State Government.

It is evident that, not only was the National Academy of Construction allotted an extent of Ac. 167.30 of land free of cost for establishing the Academy, but the initial contribution of Rs.2.7 crores also came by way of contributions as patron members from five Government corporations and four departments of the State Government and that periodical contributions, of an extent of 0.25% of the Gross bills of contractors, was as a result of such a stipulation in all contracts in which either the State Government or Government Corporations were a party. The financial control exercised by the State Government over the National Academy of Construction is overwhelming.

On the question of functional control, the Lokayukta held that, since the governing body of the Academy was dominated by and was under the influence of the Government, it was futile to contend that the Government had no functional control over the affairs of the Academy. He further held that, besides these factors which gave administrative, financial and functional domination or influence of the state government over the affairs of the Academy, Section 28 of the A.P. Societies Registration Act, 2001 gave power

to the State Government to control the affairs of the Academy, that under Section 28, when the government was a member of a society, or was wholly or substantially financing the society, it could control the affairs of the society unilaterally, in the absence of mutual agreement, by issuing a specific policy notification and since the government was a member of the Academy, this statutory provision again gave the State Government control over the affairs of the Academy. The Honourable Lokayukta rejected the contention that the control, which the State Government could exercise under Section 28 of Act 35 of 2001 was only at the inception and not thereafter. He held that the State Government could exercise control under Section 28 during the existence of the society at any time.

Section 28 of the A.P. Societies Registration Act, 2001, (hereinafter referred to as Act 35 of 2001), relates to Societies financed by the Government and, thereunder, where a Government is a member or is wholly or substantially financing a society, it may place such terms and conditions on the society as are mutually agreed upon or through specific public policy notified by the Government for this purpose.

It is evident from G.O.Ms. No. 103 dated 16.06.1998 that five Government Corporations and four Government departments became the patron members of the Academy contributing Rs.30.00 lakhs each. These four Government departments are (a) Transport, Roads and Buildings; (b) Department of Irrigation and Command Area Development; (c) Department of Panchayat Raj and Rural Development and (d) Department of Municipal Administration and Urban Development. It is also evident from

G.O.Ms. No. 103 dated 16.06.1998 that the Government had granted an extent of Ac.167.30 of land free of cost to the National Academy. In addition to Rs.2.7 crores, contributed as patron members by five Government Corporations and four Government departments, G.O.Ms. No. 92 dated 19.05.1998, G.O.Ms. No. 61 dated 11.04.2000 and G.O.Ms. No. 159 dated 30.10.2004 reveal the extent of financial contribution made to the Academy as a result of the stipulation, directed to be made by the Government, in the contracts to which either the State Government or Government Corporations were a party. It is not in doubt, therefore, that the State Government is substantially financing the National Academy of Construction. While there is no evidence on record to show that terms and conditions had been mutually agreed upon between the Government and the Academy, the Government, vide G.O.Ms. No. 108 dated 20.06.1998, had notified the public policy underlying the purpose for which the Academy had been established as also details of the governing body of the Academy to be under the Chairmanship of the Chief Minister of Andhra Pradesh, Ex-officio. There is nothing in the language of Section 28 of Act 35 of 2001 to support the contention that the power conferred thereunder on the Government, to issue public policy notifications and thereby place terms and conditions on the society, can be exercised only at the inception when the Academy was established and not thereafter. The statutory power, which the Government has under Section 28 of the Act 35 of 2001, can be exercised at any time. The power conferred on the Government under Section 28 is unfettered and is circumscribed only by the provisions of Act 35 of 2001 and not by

any rules which the Academy may have made for its internal management. That the Government has the power under Section 28 of Act 35 of 2001 to issue public policy notifications to the Academy, in view of its being a member of the Academy, and substantially financing it, would also go to show that the National Academy of Construction is a society subject to the control of the State Government.

The Hon'ble Lokayukta held that, since the Academy was a registered society subject to the control of the State, the petitioner, who was working as the Additional Director General in the Academy, was a public servant within the meaning of Section 2(k)(v)(4) of the Act. These conclusions of the Honourable Lokayukta, on a detailed examination of several Government orders and other material placed before it, are valid and do not necessitate interference in proceedings under Article 226 of the Constitution of India.

DOES THE PETITIONER, AS EX-OFFICIO ADVISOR (IRRIGATION) IN THE IRRIGATION AND COMMAND AREA DEVELOPMENT DEPARTMENT OF THE GOVERNMENT OF ANDHRA PRADESH, FALL WITHIN THE DEFINITION OF "PUBLIC SERVANT" UNDER SECTION 2(k) (iii) of Act 11 of 1983:

Under Section 2(k)(iii), a "public servant" means every officer referred to clause (i). Section 2(i) defines "officer" to mean a person appointed to a public service or post in connection with the affairs of the State of Andhra Pradesh. It is not necessary to refer to the second limb of the definition of "officer" since it was struck down by a Division Bench of this Court in **J. Paparao Vs. Government of Andhra Pradesh**[4]. To fall within the definition

of “officer” under Section 2(i) of the Act, the person should have been appointed (a) to a public service or (b) to a post in connection with the affairs of the State of A.P.

It is contended on behalf of the petitioner that he did not come under the definition of “officer” under Section 2(i) of the Act as he was only an advisor whose advice was being taken on certain matters and any advice that he had given was not binding on the State, that the words “ex-officio” used in G.O.Ms. No. 97 dated 11.9.2004 were mere surplusage, that the petitioner did not receive any salary from the Government, that G.O.Ms.No.97 dated 11.9.2004 did not indicate any duties required to be discharged by the petitioner, that the petitioner was led to believe that he was only required to advise the Government on ongoing irrigation projects that, since the order issued by the Government in G.O.Ms. No. 97 dated 11.09.2004 was that of an Advisor, as no remuneration was being paid to him from government funds and salary was being paid to him only by the society, he was not holding a public post and, merely because his advice was being taken by the Government, it cannot be said that he came within the definition of an “Officer” under the Act. It is contended that the post of Advisor is neither a cadre post nor a Constitutional post, that it was a function akin to an expert advice under Section 45 of the Evidence Act, 1872, and that the government desired such expert advice as essential in respect of matters anterior to the Jalayagnam programme. It is also contended that matters were referred to the petitioner only for his expert technical advice to the apex administrator i.e., Principal Secretary who was handicapped

with lack of technical engineering knowledge and as such the service rendered as an Advisor did not bring the petitioner within the definition of a "public servant" under the Act. It is further contended that the language used in Section 2(i), whereunder the word "officer" is defined, has been borrowed from Article 309 of the Constitution of India, that in order to come under the definition of "officer" under Section 2(i) of the Act, a master and servant relationship between the State government and the person employed was essential, that mere tendering of advice did not make the person an officer, that the advice tendered by the petitioner was only recommendatory in character and that the petitioner was not entitled to the protection of Article 311 of the Constitution of India. Reference is made to the preamble of Act 11 of 1983 to contend that it is only "action taken" which falls within the scope of the Act, that only persons who had the power to take a decision, as distinguished from mere advice, would fall within the definition of 'Officer" under Section 2(i) and thereby a "public servant" under Section 2(k)(iii) of the Act. It is contended that since the petitioner was merely tendering advice which was not binding on the Government, and as he had no power to take any decision, he cannot be said to be an "officer" or a "public servant" under the Act. Reliance is placed on behalf of the petitioner on **Dr. Gurjeewan Garewal Vs. Dr.Sumitra Dash**[5] and **Dattatraya Narayan Patil Vs. The State of Maharashtra**[6].

In his order dated 05.03.2007, the Honourable Lokayukta took note of the written comments submitted by the petitioner that the government had permitted him to peruse all the files relating to

irrigation projects and that all files were being marked for his comments as was the practice from 1998, that his long experience in the field of irrigation projects had helped him to see that the estimates of the projects, formulation of projects with regard to investigations and designs of projects were correctly estimated.

On the question whether the petitioner was an "officer" within the meaning of Section 2(i) of the Act, and whether he was appointed to a public service or a post in connection with the affairs of the State of A.P., the Honourable Lokayukta noted that, after his retirement as Chief Engineer, the petitioner had been appointed as the Technical Advisor in the Irrigation and Command Area Development Department by the State Government, vide G.O.Ms.No.654 dated 20.8.1998, with powers to co-ordinate, monitor and provide technical support to all field functionaries to implement APER Project, that all the concerned Chief Engineers and other officers were asked to extend all possible cooperation to seek his advise and provide the required information relating to A.P. Economic Restructuring Project, that the Government had extended the tenure of the petitioner as Technical Advisor to the Irrigation Department for one year from 19.7.2002 to 18.4.2003 vide G.O.Ms. No. 517 dated 19.7.2002 whereunder also he was entrusted with the additional duties of scrutiny/evaluation of high value works of R & B and Panchayat Raj Department. The Lokayukta noted the submission of the petitioner, in para 2 of his written comments, that his tenure as Technical Advisor was being renewed every year till 2004. He further noted that the petitioner was appointed as the Additional Director General of the National Academy of Construction on 3.8.2004 for a period of 2 years on a total salary of Rs.40,000/- per month with perks like car with driver, residential telephone with STD facility and mobile phones, that subsequently he was again appointed for a period of two years

with effect from 6.8.2006 as an Additional Director General of the Academy vide order dated 1.8.2006 on the same terms sand conditions and that, while he was working as Additional Director General, the Government had issued G.O.Ms.No.97 dated 11.9.2004. While taking note of the fact that G.O.Ms.No.97 dated 11.9.2004 did not specify the duties and functions of the petitioner as ex-Officio Advisor, the Lokayukta held that the Government had permitted him to peruse all files relating to irrigation projects, that all files had been marked to him for his opinion as was the practice from the year 1998 and his long experience in the field of irrigation had helped him to see that these estimates were correctly made. The Lokayukta noted that the facts which came to light during the preliminary verification clearly indicated that he was scrutinizing all the estimates even before they were placed before the Principal Secretary to the Government, Irrigation & CAD Department, that he was also the Chairman of the Technical Evaluation Committee which scrutinized bid evaluation reports, submitted by the concerned Superintending Engineers and Chief Engineers, and placed its recommendations before the High Power Committee. The Lokayukta held that as ex-Officio advisor, the petitioner was exercising considerable control over the department and was enjoying a status equal to that of the Principal Secretary to the Government, if not more and these facts clearly established that he was occupying an important position in the Government as an Ex-Officio Advisor. The Lokayukta held that the functions which the petitioner was discharging were of public nature and were in connection with the affairs of the State Government. While noting that in G.O.Ms.No.97 dated 11.9.2004 the word “appoint” was not used, he held that absence of these words would not make any difference since the definition of the word “appoint” as per Black’s Law Dictionary included to “designate, ordain or nominate” and

that the order in G.O.Ms.No.97, in effect, amounted to appointing the petitioner to a public post. The Honourable Lokayukta held that, in this view of the matter, it was unnecessary to examine whether there was a master-servant relationship between the petitioner and the State Government and whether he was under the administrative control of the State Government or was receiving pay in the State Government and that these questions were not relevant in view of the clear language employed in Section 2(i) of the Act.

The Honourable Lokayukta relied on **Dattatraya Narayan Patil**[6] and **Coal Mines Provident Fund Commissioner Vs. Ramesh Chander Jha**[7] to hold that the petitioner, who was a public servant under Section 2(k)(v)(4) of the Act, did not cease to be a public servant while discharging the additional public functions entrusted to him in the Irrigation and Command Area Development Department and the actions taken by him as such advisor were open to investigation by the Lokayukta under the provisions of the Act. The preliminary objection was rejected by the Honourable Lokyukta holding that the petitioner answered the definition of “public servant”.

The petitioner was appointed as Technical Advisor, to the Irrigation Department of the State Government vide G.O.Rt. No. 654 dated 20.08.1998, with a view to coordinate and provide technical support to the field engineers to implement the APER (Irrigation component) Project, since he had versatile experience in investigation, design and execution of irrigation works as the Technical Adviser to the Irrigation Department. Under the said G.O, the petitioner was required to co-ordinate, monitor and provide technical advice to all the field functionaries for

implementing APER project. All the concerned Chief Engineers and other officers were asked to extend all possible cooperation to the petitioner and seek his advice and provide the required information relating to the A.P. Economic Restructuring Project. The Government permitted payment of honorarium at the rate of Rs.1,000/- per day subject to a ceiling of Rs.20,000/- per month and also to reimburse the actual expenditure incurred by him on telephones, traveling etc., for carrying out his duties as Technical Advisor. The expenditure in this regard was required to be debited to the Major & Medium Irrigation Project Account of the State Government. The petitioner's services, as Technical Advisor to the Irrigation department, were extended for one year from 19.04.2002 to 18.04.2003 vide G.O.Rt. No. 517 dated 19.07.2002 and the petitioner was asked to look after, not only scrutiny/evaluation of estimates relating to the irrigation department, but also estimates of high value works of R&B and Panchayat Raj Departments and/or those which these departments chose to refer to him for advice/scrutiny. The other terms and conditions of his appointment remained unchanged. The petitioner was appointed as Additional Director General (Irrigation) of the National Academy of Construction, Hyderabad, for a period of 2 years, vide proceedings dated 3.8.2004 and, vide proceedings dated 9.9.2004, he was paid a monthly remuneration of Rs.40,000/- and in addition was given certain perquisites including a car with a driver, a residential telephone with STD facility for a maximum limit of Rs.1500/- per day and a mobile telephone with a maximum limit of Rs.1500/- per month. Thereafter the

Government, by G.O.Ms.No.97 dated 11.9.2004, appointed him as the ex-officio Advisor (Irrigation) I & CAD Department. The said G.O. reads:

"Dr.P.Sitapati Rao has joined National Academy of Construction, Hyderabad as Additional Director General, Irrigation.

Government after careful consideration hereby order that Dr.P.Sitapati Rao will also work as Ex-officio Advisor (Irrigation) I & CAD Department"

The petitioner's appointment as Additional Director General (Irrigation) in the National Academy of Construction was extended, vide proceedings dated 01.08.2006, for a period of two years from 06.08.2006. While he was continued to be paid a remuneration of Rs.40,000/- per month, the maximum limit for the residential telephone and the Mobile phone was enhanced to Rs.2,000/- per month. In addition he was paid a service allowance of Rs.2,000/- per month.

It is thus evident that the petitioner was paid honorarium of Rs.1,000/- per day subject to a ceiling of Rs.20,000/- by the State Government till he was appointed as Additional Director General of the National Academy of Construction. Payment of honorarium was stopped only because he was paid twice as much as remuneration by the National Academy of Construction.

In his affidavit, filed in support of the writ petition, the petitioner states that he worked in the Irrigation Department from 1980 till he superannuated in the year 1993 as the Chief Engineer, that in the year 1998 the State Government had appointed him as the Head of the A.P. Economic Restructuring (Irrigation Department) Projects, with an outlay of Rs.1299.00 crores, in order to improve the performance of the irrigation systems in the State, that the Government, taking into consideration his versatile experience in investigation, design and execution of irrigation

works, had appointed him as the technical advisor in the Irrigation Department for two years, that the appointment was extended from time to time from the year 1998 and that, in the year 2003, G.O.Rt. No. 517 dated 19.07.2002 was issued wherein the Government had extended his term as Technical Advisor for a period of one year from 19.04.2002 to 18.04.2003 and had entrusted the additional work of not only scrutiny/evaluation of estimates relating to irrigation department, but also estimates of high value works of R&B and Panchayat Raj Departments and that his tenure was renewed every year till 2004. The petitioner states that, during the above period, he was involved in the work of monitoring Owk tunnel and Owk reservoir projects in Kurnool District, that he was involved in formulation and monitoring of medium irrigation projects financed by the World Bank such as Surampalem Reservoir Project, Kovvada Kalva Reservoir Scheme, Pedderu Reservoir Scheme etc., that he was also entrusted with the down stream protection works of Prakasam Barrage, Dam Safety work of Srisailam Project, scrutiny of Estimates, claims of various contractors, scrutiny and evaluation of estimates of high value and works of Roads and Buildings and Panchayat Raj departments, that he was also incharge of the works connected with Godavari Pushkarams in the year 2003 and that his work was appreciated by the Government. Petitioner further states that, whenever there was any damage to any of the dams or irrigation projects in the State, he was the first person to be sent to take temporary and permanent restoration of the damaged dams, etc and in this regard he was sent to take remedial measures in Sathanala Dam in Adilabad District, Kandaleru Dam near Nellore and P.A.B.R. Dam near Anantapur. In the words of the petitioner, in para 4 of his

affidavit,:-

"I submit that in the year 2004, I was appointed as Additional Director General of National Academy of Construction on 03.08.2004. **Taking into consideration of my vast experience in the field of irrigation projects, the Government of Andhra Pradesh has issued G.O.Ms. No. 97 dated 11.09.2004 wherein I was asked to work as Ex-Officio Advisor (Irrigation) I & CAD department. I submit that the nature of works and duties have not been enumerated in the G.O. that has been issued by the Government, but however all the files relating to the irrigation projects were being marked to me for my opinion which was the practice from the year 1998. I submit that the long experience in the field of irrigation projects has helped me to see that the estimates of the projects, formulation of projects with regard to investigations and designs of projects are correctly estimated. I submit that my experience in the irrigation field was being utilized by the government and my advice is taken in the matters pertaining to irrigation. In most of the projects, I was instrumental in reviewing the estimates that have been prepared by the department." (emphasis supplied.)**

It is true that the words "person appointed to a public service or post in connection with the affairs of the State", found in the definition of "officer" under Section 2(i) of Act 11 of 1983, is also to be found in Article 309 of the Constitution of India. While the Hon'ble Lokayukta found it unnecessary to go into the question whether there existed a master and servant relationship between the State Government and the petitioner as Ex-Officio Advisor in the Irrigation Department, it is contended on behalf of the petitioner that it is only if this test is satisfied can the petitioner be said to have been appointed to a public service or as holding a post in connection with the affairs of the State of Andhra Pradesh. There is no formal definition, under the Constitution of India, of "post" and "civil post". A civil post is distinguished in Article 310 of the Constitution of India from a post connected with the defence. It is a post on the civil as distinguished from the defence side of the administration, an employment in a civil capacity under the Union

or a State. In Article 311, a member of a civil service of the Union or all-India service or a civil service of a State is mentioned separately and a civil post means a post not connected with defence outside the regular civil services. A post is a service or employment. A person holding a post under a State is a person serving or employed under the State. A post under the State is an office or a position to which duties in connection with the affairs of the State are attached, an office or a position to which a person is appointed and which may exist apart from and independent of the holder of the post. It is not possible to lay down a definite test to determine when a person may be said to hold a civil post under the Government. There is a relationship of master and servant between the State and a person said to be holding a post under it. The true test for determination of the question whether a person is holding a civil post or is a member of the civil service is the existence of a relationship of master and servant between the State and the person holding a post under it. Several factors may indicate the relationship of master and servant. None may be conclusive. On the other hand, no single factor may be considered absolutely essential. The presence of all or some of the factors, such as, the right to select for appointment, the right to appoint, the right to terminate the employment, the right to take other disciplinary action, the right to prescribe the conditions of service, the nature of the duties performed by the employee, the right to control the employee's manner and method of the work, the right to issue directions and the right to determine and the source from which wages or salary are paid and a host of such circumstances, may have to be considered to determine the existence of the relationship of master and servant. In each case, it is a question of

fact whether a person is a servant of the State or not. (**State of Assam Vs. Kanak Chandra Dutta**[8]; **Mathuradas Mohanlal Kedia Vs. S.D. Munshaw**[9]; and **State of Gujarat Vs. Raman Lal Keshav Lal Soni**[10]). But co-existence of all these indicia is not predicated in every case to make the relation one of master and servant. In special classes of employment a contract of service may exist, even in the absence of one or more of these indicia. (**State of Uttar Pradesh Vs. Audh Naarain Singh**[11]).

As noted above the petitioner, as a Technical Advisor of the Irrigation Department, was being paid an honorarium of Rs.1000/- per day subject to a ceiling of Rs.20,000/- per month in addition to certain other perquisites. It is only after he was appointed as the Additional Director General of the Academy, where he was paid a monthly remuneration of Rs.40,000/-, that payment of honorarium, as Ex-Officio Advisor in the Irrigation department were stopped. The mere fact that he was not being paid monthly remuneration by the State Government, in the light of the facts and circumstances mentioned above, would not, by itself, indicate absence of a master and servant relationship between the State Government and the petitioner. Suffice to note that in **Coal Mines Provident Fund Commissioner**[7], the Supreme Court held that the word "to serve" meant "to perform, function; do what is required for", and the mere fact that the Commissioner received salary and allowances out of the Coal Mines Provident Fund and not from the government, during his tenure as Commissioner, would make no difference when the description as an officer in "service" of the government was answered.

Similarly, the fact that there is no cadre post of

Advisor/Technical Advisor in the Irrigation department is of no consequence since the appointment to a post outside the regular civil services, if under the direct control of the State Government, would still render such person as one holding a civil post under the State Government. Reference can usefully be made to a few such cases which came up for consideration before the Supreme Court.

The Extra Departmental Agents system in the Department of Posts and Telegraphs was in vogue since 1854. The object underlying it was to cater to the postal needs of the rural communities dispersed in remote areas. The system availed of the services of schoolmasters, shopkeepers, landlords and such other persons in a village who had the faculty of reasonable standards of literacy and adequate means of livelihood and who, therefore, in their leisure could assist the Department by way of gainful avocation and social service in ministering to the rural communities in their postal needs, through maintenance of simple accounts and adherence to minimum procedural formalities, as prescribed by the Department for the purpose. In **The Supdt. of Post Offices Vs. P.K. Rajamma**[12], and **Union of India Vs. Kameshwar Prasad**[13], the Supreme Court held that an extra departmental agent held a post under the administrative control of the State, that though such a post was outside the regular civil services, there was no doubt it was a post under the State, that these extra departmental agents worked under the direct control and supervision of the postal authorities who had the right to control the manner in which they carried out their duties and that the relationship between the postal authorities and the extra departmental agents was one of master and servant.

In **Kanak Chandra Dutta**[8], the question which arose for consideration was whether a Mauzadar was a person holding a civil post under the State within the meaning of Art. 311 of the Constitution of India. The Supreme Court held that a Mauzadar in the Assam Valley was the holder of a civil post under the State, that a post outside the regularly constituted services need not necessarily carry "a definite rate of pay" and may be a part-time employment and that the conditions of service of a Mauzadar enabled him to engage in other activities.

It is evident from G.O.Rt.No.654 dated 20.8.1998 that the petitioner, as a Technical Advisor to the Irrigation Department, was assigned the duties of coordinating, monitoring and providing technical advice to all the field functionaries for implementing A.P. Economic Restructuring (Irrigation component) project with an outlay of about Rs.1299 Crores. In addition to these duties the Government, vide G.O.Rt. No. 517 dated 19.7.2002, had also asked the petitioner to look after, not only the scrutiny/evaluation of estimates related to the Irrigation Department, but the estimates of high value works of the Roads and Buildings and Panchayat Raj Departments and/or those which these departments choose to refer to him for advice/scrutiny. These duties were assigned to the petitioner in view of his versatile experience in investigation, design and execution of irrigation works. Since these duties were assigned by the Government to the petitioner by way of executive orders they assume the character of public duty. (**Dattaraya Narayan Patil**[6]). As is evident from the averments of the petitioner in his affidavit, relevant portion of which is extracted above, all files relating to irrigation projects were marked for his opinion, even after G.O.Ms.No.97 dated 11.9.2004 was issued as

was the practice from the year 1998. In effect, the petitioner continued to discharge the very same duties which were assigned to him as Technical Advisor in the Irrigation Department from 1998 onwards. It is evident, from the G.Os. referred to herein above, that the government exercised control over the petitioner's manner and method of work, in the sense that it chose to decide which files were required to be sent to him for his expert advice. The petitioner was appointed for a fixed duration and his appointment was periodically extended. The Government had the right to terminate the engagement. The petitioner, as Ex-officio Advisor in Irrigation department, rendered service to the Government by giving his expert advise on several matters. He was also the Chairman of the Technical Evaluation Committee which made its recommendations to the High power committee. It is, therefore, evident that the relationship between the State Government and the petitioner, (as Technical Advisor in the Irrigation Department), was that of a master and servant and that the petitioner was discharging public duties assigned to him under executive orders of the government. The petitioner, in rendering service and discharging public duties in connection with the affairs of the State as a Technical Advisor in the Irrigation department, must be held to have been appointed to a public service and a post in connection with the affairs of the State of A.P.

Reliance is, however, placed on behalf of the petitioner on **Mrs. Gurjeewan Garewal Vs. Sumitra Dash**[14], to contend to the contrary. In **Mrs. Gurjeewan Garewal**[14], the Supreme Court observed that Article 311 of the Constitution of India conferred certain safeguards upon persons employed in a civil capacity under the Union or a State and that only persons holding "civil

posts" could claim protection under Article 311. The Supreme Court noted that, under Section 4 of the **Post Graduate Institute of Medical Education and Research, Chandigarh Act, 1966, (PGIMER Act), PGIMER** was a 'body corporate having a perpetual succession and a common seal, that PGIMER was a separate entity in itself, that employees of any authority, which was a legal entity separate from the State, could not claim to be holders of civil posts under the State in order to avail the protection of Article 311, that there was also no master and servant relationship between the State and an employee of PGIMER, which was a separate legal entity in itself and that employees of PGIMER could not avail the protection of Article 311 as it could only be claimed by members of a civil service of the Union or of All India Service or of a Civil service of a State or by persons who held a civil post under the Union or a State.

The petitioner's appointment as Additional Director General in the National Academy for Construction does not, by itself, make him a person holding a civil post under the State. It is as an Advisor (Irrigation), in the Irrigation and Command Area Development Department of the State Government, that he holds a post in connection with the affairs of the State of Andhra Pradesh. The judgment in **Mrs. Gurjeewan Garewal**[14] has, thus, no application to the facts of the present case.

Sri S.R. Ashok, learned Senior Counsel, would contend that even if the Academy was held to be a society subject to the control of the State Government and, by virtue of his being its Additional Director General, the petitioner is held to be a public servant, even then it is only with regards the functions which he

has discharged in the society could an enquiry be held under the Act and not any "action" taken pursuant to any recommendations which he may have made as the Advisor in the Irrigation and Command Area Development Department of the Government of A.P. This question may not strictly necessitate examination as we have held that the petitioner, on his services being engaged as a Technical Advisor, is a public servant under Section 2(k)(iii) of the Act also. The word "Ex-Officio" is defined, (Refer Law Lexicon by P. Ramanatha Aiyer – Reprint 2002 edition), to mean "by virtue of office". Since the petitioner was appointed as Ex-Officio Advisor, (Irrigation), under G.O.Ms. No. 97 dated 11.09.2004, as he was the Additional Director General in the National Academy of Construction, a society subject to the control of State Government, it cannot be said that the words "Ex-officio" as used in the said G.O. is inappropriate surplussasge. Any action taken by the petitioner, as Technical Advisor, can be the subject matter of investigation by the Lokayukta and it is not necessary that the investigation should be confined only to his functions as Additional Director General of the National Academy of Construction. The contention that it is only a decision taken by a public servant, and not a mere recommendation, which can be the subject matter of investigation under Act 11 of 1983, does not merit acceptance. Act 11 of 1993, as is evident from its preamble, is an Act to make provision for investigation of administrative action taken by or on behalf of the Government of A.P. or certain public authorities in the State of A.P. including any omission and commission in connection with or arising out of such action and for all matters

connected therewith. Section 2(a) of the Act defines "action' to mean an action taken by a public servant in the discharge of his functions, as such public servant, by way of recommendation also. Even if it were to be held that the petitioner, as a Technical Advisor (Irrigation), was only making recommendation, and not taking any decision, his recommendation, by itself, would fall within the definition of "action" under Section 2(a) and be amenable to investigation under the Act by the Honourable Lokayukta.

Since the petitioner, as the Additional Director General of the National Academy for Construction and the ex-Officio Advisor (Irrigation) of the Government of A.P, is a "public servant" within the meaning of Section 2(k)(v)(4) and Section 2(k)(iii) of Act 11 of 1983, the challenge to the order of Honourable Lokayukta dated 5.3.2007 must fail.

This Court, by order in W.P.M.P. No. 7088 of 2007 in W.P. No. 5563 of 2007 dated 20.03.2007, observed that the application, seeking stay of the proceedings in Complaint No. 890/2005/B1, pending before the Lokayukta, Andhra Pradesh, was liable to be dismissed because it was not supported by any affidavit and that the stay order of the Court would jeopardize the ongoing proceedings pending before the Lok Ayukta, Andhra Pradesh in a complaint involving, not only the petitioner, but three other persons and that it would not be in public interest to stultify proceedings at that stage. In W.P. No. 13933 of 2007 this Court, in its docket proceedings dated 26.07.2007, took note of the submission made on behalf of Sri M.V.S. Suresh Kumar, learned Counsel appearing for the Institution of the Lok Ayukta, that the Lok Ayukta, who had demitted office, had already prepared the report and the same had been put in a sealed cover. This Court directed the sealed cover

containing the report prepared by the Lok Ayukta be kept ready for perusal of the Court. On 17.09.2007 this Court noted that Sri M.V.S. Suresh Kumar had produced two sealed envelopes, that he had stated that the same contained the report prepared by the Lok Ayukta, Andhra Pradesh and that the sealed covers were shown to the Counsel for the petitioner and returned to Sri M.V.S. Suresh Kumar for being handed over to the office of the Lok Ayukta. Since the report of the Hon'ble Lokayukta is ready, and is kept in a sealed cover, it shall, in accordance with Section 12(1) of the Act 11 of 1983, be forwarded to the competent authority forthwith.

The writ petition, however, fails and is, accordingly, dismissed. No order as to costs.

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BILAL NAZKI, J

Date: .12.2007

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RAMESH RANGANATHAN, J

Note: L.R. copy to be marked.

B/o

MRKR/ASP

[1] AIR 1988 SC 1369
[2] AIR 1974 SC 1863
[3] (2002) 5 SCC 111
[4] 2004(2) ALT 663
[5] (2004)5 SCC 263
[6] (1976) 1 SCC 11
[7] (1990)1 SCC 589
[8] AIR 1967 SC 884
[9] AIR 1981 SC 53
[10] AIR 1984 SC 161
[11] AIR 1965 SC 360
[12] AIR 1977 SC 1677
[13] (1997) 11 SCC 650
[14] 2004(5) SCC 263